BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LINCOLN P. BYERLEY	)	
Claimant	)	
	)	
VS.	)	
	)	
GREAT PLAINS MANUFACTURING, INC.	)	
Respondent	)	Docket No. **1,054,758**
	)	
AND	)	
	)	
SENTRY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the May 8, 2012, Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on October 9, 2012. The Workers Compensation Director appointed E.L. "Lee" Kinch of Wichita, Kansas, to serve as Board Member Pro Tem in place of David A. Shufelt, who retired in September 2012.

APPEARANCES

Jan L. Fisher of Topeka, Kansas, appeared for claimant. Joseph C. McMillan of Lenexa, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant sustained no permanent injury or permanent impairment of function as a result of the series of repetitive traumas alleged by claimant.

Claimant asserts he sustained permanent injury to his back as a result of the repetitive bending, twisting and lifting required by his work for respondent through February 23, 2011.[1] Claimant also contends his injuries caused a 10% permanent partial impairment to the whole person and he should accordingly be awarded PPD based on that percentage. Claimant alleges no work disability at this time. Claimant requests the Award of Judge Moore be reversed.

Respondent maintains claimant did not satisfy his burden to prove he sustained personal injury by repetitive traumas arising out of and in the course of his employment. Respondent also asserts claimant did not provide timely notice to respondent, as mandated by K.S.A. 44-520. Respondent requests the Award be modified to deny all workers compensation benefits to claimant. In the alternative, respondents urges the Board to affirm the Award.

The issues presented by the parties for the Board's consideration are:

(1) whether claimant sustained personal injury by a series of repetitive accidents arising out of and in the course of his employment;

(2) whether claimant provided respondent with timely notice, as required by K.S.A. 44-520;

(3) the nature and extent of claimant's disability, if any;

(4) whether claimant is entitled to the payment of medical expenses; and,

(5) whether claimant is entitled to future medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Great Plains Manufacturing, Inc. was engaged in the production of farm machinery, specifically tillage implements. Claimant was hired by respondent as a welder in September 2008. Claimant was required to weld such items as turbo discs, harrows and other components of respondent's final products. Some of the welding work required vigorous physical activity, including lifting steel, loading jigs and welding from ladders and on the floor. The lifting ranged from very light to approximately 50-100 pounds.

[1] R.H. Trans. at 5-8.

In 2010, claimant was moved from welding to assembly, which required claimant to operate a forklift. Thereafter, claimant worked in the painting and fabrication departments. Claimant last performed work for respondent on about February 10, 2011.

The sequence of the various jobs claimant performed for respondent was: claimant was a welder from September 26, 2008, through October 4, 2010; drove a forklift from October 4, 2010, to November 8, 2010; worked in the paint department from November 8, 2010, to November 16, 2010; worked in welding again from November 16, 2010, through February 2, 2011; and finally from February 2 to February 10, 2011, claimant worked in the fabrication department.

Claimant testified he first experienced back and left leg pain which he attributed to his work for respondent in June or July 2010. Claimant testified at the regular hearing as follows:

> Q. When you first noticed these back problems, did you associate them with any particular activity?
>
> A. More so downloading the paint line.
>
> Q. What was it about downloading the paint line that seemed to give you problems with your back?
>
> A. It was just constant pulling, lifting, bending, squatting. I mean, it was just -- it was hard work.[2]

Claimant claimed he ultimately stopped working for respondent because he "just couldn't handle it [claimant's low back and radicular pain] anymore."[3]

Contrary to claimant's testimony, his back and left radicular pain did not begin in June or July 2010. Nor did his back and leg complaints first become severe in June or July 2010. Nor did claimant first experience significant symptoms in his back and lower extremities when he was working in the painting department in November 2010.

Claimant's low back and radicular symptoms were caused by his participation in the lifting of a couch at his home on or about February 6, 2010.

After claimant injured his back lifting the couch, he initially sought treatment from his personal care physician on February 8, 2010. Claimant told Dr. Ronald Whitmer he

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[2] R.H. Trans. at 31.

[3] Byerley Depo. at 65.

was moving a couch from his house to a moving van when he felt a sharp pain in his lower back. Dr. Whitmer prescribed pain medication and suggested a CT scan.[4]

Claimant also sought treatment on his own from Milo Wilcox, D.C., on February 10, 2010. Claimant told Dr. Wilcox he suffered moderate impairment from pain in the low back which began on February 6, 2010. Claimant also complained of numbness in the right thigh. Claimant identified his condition as a home injury, not a work injury.[5] Claimant underwent chiropractic adjustments by Dr. Wilcox during February 2010. Claimant did eventually return to see Dr. Wilcox but not until January 16, 2011.

Claimant had a follow-up appointment with Dr. Whitmer on May 26, 2010. Claimant was seen by Shawn McGowan, a physician's assistant with Dr. Whitmer's office. Claimant complained of worsening, severe low back pain and "shooting" pain into both lower extremities. A lumbar MRI scan and physical therapy were recommended. A neurosurgical consultation was also recommended.

On May 27, 2010, claimant underwent a lumbar MRI, which revealed degenerative disc disease at L-1, L4-5 and L5-S1 with no marked spinal stenosis, although mild neural foraminal narrowing was present at several levels of the lumbar spine.

In August 2010 claimant received additional chiropractic treatment from Dr. Kimberly Torkelson.[6] Claimant's initial history to Dr. Torkelson was in relevant part as follows:

> Mr. Byerley reported he has been having low back pain especially on the left side for about six months. Back in February he was carrying a couch when he went to step back onto the truck, his back twisted and he had instant pain. The pain has been constant since then. He is also having left sided sciatic pain to about his mid-calf. He states that the pain wakes him during the night, and to turn over to get a different position causes pain. He has seen Dr. Wilcox in Salina for chiropractic treatments, but due to the distance and his work schedule he has not able to go on a regular basis. He has also tried pain medications, but they sometimes don't even help with the pain. He had an MRI done on his lumbar spine in May of 2010 at ECMC which showed some mild to moderate disc bulging and mild canal narrowing. Due to the findings on his MRI his primary care physician has scheduled him an appointment with a neurosurgeon for further consultation. . . . He is a welder for Great Plains Manufacturing and his job requires him to do a lot of lifting and

[4] There is no indication in the record a CT scan was conducted.

[5] R.H. Trans., Cl. Ex. 1 at 25.

[6] The stipulation admitted into evidence at the regular hearing as Claimant's Ex. 1 erroneously refers to Dr. Torkelson as an "M.D." rather than a "D.C."

> standing. He has not had any major trauma or MVA's. He is a non-smoker who gets moderate exercise daily.[7]

On August 23, 2010, claimant commenced treatment with Dr. Ali Manguoglu, a neurosurgeon. The history provided by claimant to Dr. Manguoglu was:

> He is a pleasant 39-year-old patient presenting with chronic back pain, more recently on the left paraspinal sacroiliac region. He had these symptoms before. The patient has worked hard all his life, and at Great Plains Manufacturing, he is a welder. He obviously does lifting, bending, twisting, but there has not been a specific work-related injury. The pain has become rather constant. At times, he rates his pain 8 on a scale of 0 to 10. Pain does not radiate more than left posterior buttock area.[8]

There is no indication claimant told Dr. Manguoglu about the lifting injury he sustained in February 2010. Under the care of Dr. Manguoglu claimant received medication, a left SI joint injection, and lumbar epidural steroid injections. Claimant did not improve under Dr. Manguoglu's treatment. When last seen on December 21, 2010, the doctor recommended physical therapy and additional diagnostic testing. The record does not indicate whether claimant followed Dr. Manguoglu's recommendations.

Claimant testified that following his last day of work for respondent (claimant resigned) he started to work for another employer. The job change, according to claimant, resulted in improvement of his low back pain.

Claimant was 40-years old at the January 19, 2012 regular hearing. He was employed without restrictions as a full-time detail sergeant at the Ellsworth Correctional Facility. He commenced employment for the correctional facility on February 21, 2011. Claimant was required to undergo a physical examination before starting work at the correctional facility. Claimant passed the physical.

Dr. C. Reiff Brown, a retired orthopedic surgeon, evaluated claimant on February 18, 2011, at the request of claimant's attorney. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Brown diagnosed degenerative disc disease at the lower two lumbar segments. The doctor opined claimant's work activities aggravated and caused claimant's lumbar degenerative disc disease to become symptomatic. Dr. Brown testified:

> It is true that the lifting the couch and other furniture incident did cause an increase in severity of his symptoms, but his continued work activity since then has caused

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[7] R.H. Trans., Cl. Ex. 1 at 16.

[8] *Id*., Cl. Ex. 1 at 5.

> a further increase in his injury. Now that he is doing lighter work activity his symptoms have been reduced and leveled off at a more acceptable level.[9]

At the time of Dr. Brown's examination, claimant had reached maximum medical improvement. Based upon the AMA *Guides*,[10] Dr. Brown placed claimant in DRE Lumbosacral Category III which resulted in a 10% functional impairment to the body as a whole. The doctor imposed permanent restrictions of: no work involving repeated flexion and rotation of the lumbar spine more than 30 degrees; no lifting above 30 pounds occasionally, 15 pounds frequently; and no lifting below knuckle level. Lifting should be done using proper mechanics.

Dr. Brown reviewed the list of claimant's previous work tasks prepared by vocational consultant Doug Lindahl[11] and concluded claimant could no longer perform 11 of the 25 tasks for a 44% task loss.

Using the range of motion model, Dr. Brown opined claimant had a 12% whole body functional impairment.

Dr. Brown testified:

> Q. So if the couch incident increased permanently his baseline, and he is currently at a point below that, how is it that in your opinion his work at Great Plains permanently aggravated his condition?
>
> A. Well, we'll have to put him back to work at the level that he was at Great Plains to see where his baseline really has established itself. So take somebody -- anybody that has a back problem, put them in a brace, put them in a wheelchair, decrease their level of activity, they're going to have a decrease in pain. Which doesn't mean that they don't have the problem that created the pain previously.[12]
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> Q. Doctor, is it possible that his radicular symptoms were as a result of the acute injury with the couch?
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> A. Oh, that's possible.

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[9] Brown Depo., Ex. 2 at 3.

[10] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

[11] Mr. Lindahl interviewed claimant and prepared a list of 25 nonduplicative work tasks claimant performed in the 15-year period prior to the alleged accidental injuries. The list included the physical requirements associated with each task.

[12] Brown Depo. at 32-33.

Q. Is there anything, other than speculating, what that was a result of, whether it was a result of the couch or the ongoing work that he was doing?

A. There's no way to prove one way or the other.

Q. Okay. So what we know is there was no documented treatment prior to this February 2010 incident with the couch, correct?

A. Yes.

Q. Okay. And then following that incident, he sought fairly immediate care, correct?

A. Yes.

Q. That was constant until he stopped treating in January of 2011.

A. Yes.[13]

Dr. Brown further opined:

Q. Okay. And, then, so we can agree that the only incident that we know for certain that has increased or permanently aggravated his baseline is the couch incident?

A. I think that we can assume that it aggravated it some, yeah.[14]

Dr. Matthew Henry, a neurosurgeon, evaluated claimant on July 22, 2011, at the request of respondent's attorney. Claimant complained of low back pain radiating to the left buttocks and intermittent calf discomfort. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Henry testified:

And I don't think he -- I think my -- with regard to the role Mr. Byerley's work activities at Great Plains Manufacturing had regarding his current medical condition, it is likely minimal, if any, of these are responsible for this as the findings on the MRI were consistent with age-related changes, and per his and his girlfriend's story, this was a gradual onset and exacerbated by moving furniture.

You know, gravity and wear and tear always does provide some wear and tear on the spine; but I don't think he provided anything that tied it in to work. I remember -- 'cause usually when you ask someone these questions, usually they give you something to, to go on. I'm just, just --

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[13] Brown Depo. at 35.

[14] *Id*. at 39.

Q. And Mr. Byerley didn't?

A. He did not.

Q. Okay. The only incident that he informed you of was the incident moving the furniture in 2010; is that accurate?

A. Yes.[15]

Claimant did not tell Dr. Henry his work for respondent aggravated his back. Dr. Henry's diagnosis was low back pain and possible discogenic pain at L5-S1 with degeneration at L1-2 and L4-5. Dr. Henry recommended a discogram at L1-2, L4-5 and L5-S1. In Dr. Henry's opinion the lumbar MRI scan conducted in May 2010 revealed degeneration at L1-2, L4-5 and L5-S1. The doctor recommended a different muscle relaxant and a TENS unit.

Dr. Henry's causation opinion is set forth in his July 22, 2011 report:

> With regard to the role of Mr. Byerley's work activities at Great Plains Manufacturing had regarding his current medical condition, it is likely minimal if any, as these are consistent with age-related changes and per his and his girlfriend's story this was of gradual onset and was exacerbated by moving furniture.[16]

K.S.A. 44-501(a) states:

> An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.[17]

K.S.A. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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[15] Henry Depo. at 12-13.

[16] *Id.*, Ex. 2 at 1.

[17] *See Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[18]

Whether an accident arises out of and in the course of the worker's employment depends on the facts of the particular case.[19]

The Board finds claimant did not sustain his burden to prove he was injured by a series of repetitive accidents arising out of and in the course of his employment with respondent. Claimant's testimony is not reliable. He could not seem to "get his story straight."

Claimant testified he began experiencing significant symptoms in June or July 2010. During that time period, claimant was working for respondent as a welder, a job he had been doing for two years without apparent difficulty. Claimant told Dr. Torkelson in August 2010 his symptoms started with the lifting of the couch and had been constant since then. Claimant told Dr. Manguoglu he had experienced symptoms before and the symptoms had become rather constant.

Other evidence indicates claimant had immediate treatment and severe symptoms following lifting of the couch at his home. Claimant denied having low back symptoms before the "couch" event on February 6, 2010, however, he told Dr. Henry he had a gradual onset of back pain from late 2009 or early 2010. Claimant denied having back pain before the couch lifting incident.

If the onset of claimant's symptoms was in late 2009 or early 2010 then claimant's testimony is inconsistent that he first experienced significant low back symptoms in June or July 2010. Adding to the confusion, claimant testified he injured his back by performing

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[18] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995)

[19] *Id*.

work in the painting department. Claimant only worked in the paint department for several days in November 2010, well after June or July 2010.

Claimant testified the condition of his back improved when he resigned from respondent and started a job with the correctional facility.

The evidence supports the conclusion that claimant sustained a significant injury lifting the couch, which caused severe back pain and shooting pain down both lower extremities. After the couch lifting incident, claimant rapidly sought treatment from a number of physicians. Such treatment continued until after claimant resigned his position from respondent in February 2011.

The Board finds the opinions of Dr. Brown are speculative and conjectural and are entitled to less weight than the opinions of Dr. Henry.

A preponderance of the credible evidence does not establish that claimant's low back and lower extremity complaints were caused, contributed to, or aggravated by claimant's work for respondent. Claimant's testimony regarding the onset of his symptoms conflicts with itself and with the histories he provided the medical providers. The Award is therefore modified to deny compensation in this claim because claimant did not sustain his burden to prove personal injury by accident or by a series of repetitive accidents arising out of and in the course of his employment.

Given the above findings the other issues raised by the parties are moot and will not be addressed by the Board.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[20] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated May 8, 2012, is modified to deny all workers compensation benefits to claimant. The Award is affirmed insofar as it is consistent with the Board's findings and conclusions.

IT IS SO ORDERED.

[20] K.S.A. 2010 Supp. 44-555c(k).

Dated this _____ day of April, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

e: Jan L. Fisher, Attorney for Claimant
janfisher@mcwala.com
Joseph C. McMillan, Attorney for Respondent and its Insurance Carrier
ecruzan@mulmc.com
Bruce E. Moore, Administrative Law Judge